

# Sex Offender Regulations and the Rule of Law: When Civil Regulatory Schemes Circumvent the Constitution

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## Introduction

Sexual offenses are among the most heinous crimes one person can inflict upon another. Often, the victim is traumatized for the rest of his or her life and the offender, when found guilty, faces incarceration and life-altering sex offender registration requirements. As humans, our hearts and our sympathy naturally go out to the victims. Admittedly, it is hard to feel much sympathy for sex offenders. However, as a society based on the rule of law, we need to ensure that we are punishing offenders and regulating the post-incarceration activities of this group of individuals within constitutional limits.

Legislatures across the United States are recognizing that decades of increasingly punitive criminal justice policies have resulted in extraordinary monetary costs, and severe collateral consequences for convicted individuals and their communities.<sup>1</sup> While some states have decided to release certain classes of criminals from correctional institutions and expand rehabilitation programs, all states have uniformly taken the opposite stance towards persons found guilty of sex crimes.<sup>2</sup> As one scholar noted, “even as we reduce sentencing for drug, firearm possession, and other crimes, sex offender laws in the United States continue to expand and become more

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1. Press Release, The White House, CEA Report: Economic Perspectives on Incarceration and the Criminal Justice System (Apr. 23, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/23/cea-report-economic-perspectives-incarceration-and-criminal-justice>.

2. Jazmine Ulloa, *‘I Took Someone’s Life—Now I am Giving Back’: In California’s Prisons, Inmates Teach Each Other How to Start Over*, L.A. TIMES (Apr. 20, 2017), [www.latimes.com/politics/la-pol-sac-prop-57-prison-programs-20170420-htmllstory.html](http://www.latimes.com/politics/la-pol-sac-prop-57-prison-programs-20170420-htmllstory.html).

severe.”<sup>3</sup> As the general public’s awareness of sex crimes committed in universities, the military, and against women and children grows, legislatures have dramatically increased the incarceration penalties for sex offenses as well as the post-incarceration regulations once released.<sup>4</sup>

Noting that the penalties for sex crimes have become more severe, we need to ensure that all laws are subject to constitutional limits. When a person is convicted and sent to prison, liberty is removed, yet many constitutional rights, such as due process, freedom from cruel and unusual punishment, ex post facto<sup>5</sup> laws, and double jeopardy remain.<sup>6</sup> When a convicted person is given probation or released on supervised release, his or her criminal constitutional protections are retained because these post-incarceration schemes are intended to remain punitive. In contrast, when an individual is adjudicated as a sex offender, once the offender is released, similar constitutional rights other classes of criminals enjoy often do not apply.<sup>7</sup>

The constitutionality of post-incarceration sex offender regulations hinges on whether or not the regulations were enacted under civil law as a non-punitive measure for the protection of the populace, or were imposed as a punitive measure.<sup>8</sup> If the regulatory program is found to be punitive, then the inquiry ends, and the constitutional protections noted above apply.<sup>9</sup> If the program is found to be nonpunitive for a public purpose, then the regulatory scheme can ignore criminal constitutional considerations.<sup>10</sup>

The United States Supreme Court first addressed constitutional challenges to sex offender regulation statutes in *Kansas v. Hendricks* and

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3. See Rebecca DiBennardo, *Sex Offenders Are Among the Most Harshly Punished Criminals in the State, But How Often Does the Punishment Fit the Crime?*, CTR. FOR THE STUDY OF WOMEN (Jan. 5, 2017), <https://csw.ucla.edu/2017/01/05/sex-offenders-among-harshly-punished-criminals-state-often-punishment-fit-crime/>.

4. Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 38 (2010) (discussing how the media attention surrounding high-profile but rare crimes skews the public’s perception toward believing these crimes occur more often than they do).

5. *Ex Post Facto*, BLACK’S LAW DICTIONARY (10th ed. 2014) (done or made after the fact; having retroactive force or effect).

6. U.S. CONST. amends. IV, V, VIII, XIV; see also *Bounds v. Smith*, 430 U.S. 817, 824 (1977) (enshrining a constitutional protection of prisoner access to courts, without which, other constitutional rights would be meaningless).

7. See generally *Does # 1-5 v. Snyder*, 834 F.3d 696, 706 (6th Cir. 2016) (holding that current sex offender regulations offend the prohibition against ex post facto laws and noting that additional constitutional claims are far from frivolous).

8. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

9. *Smith v. Doe*, 538 U.S. 84, 85 (2003).

10. *Id.* at 105–06.

*Smith v. Doe*.<sup>11</sup> In *Hendricks*, the Kansas State legislature retroactively applied a law permitting certain sex offenders to be civilly committed after they served their prison sentences.<sup>12</sup> In *Smith*, the Alaska legislature lengthened the time sex offenders were required to register on a sex offender registry and applied these new requirements on individuals already subject to existing registration requirements.<sup>13</sup> In each case, the majority held these laws to be civil, nonpunitive regulatory measures and thus, the retroactive application of these laws, contravening the prohibition against ex post facto laws, was permitted.<sup>14</sup>

In contrast, the dissenting justices in *Hendricks* and *Smith* believed that the relevant sex offender regulation schemes in place in the late 1990s and early 2000s already constituted an “affirmative restraint” on sex offenders and should have been declared punitive.<sup>15</sup> The dissenting justices, believing sex offender regulations to be punitive, reasoned that criminal constitutional protections should be extended to these individuals and that retroactive ex post facto application of these laws should have been prohibited.<sup>16</sup>

For more than two decades, constitutional challenges to sex offender statutes have generally failed because most courts have followed the precedents set by the United Supreme Court in *Hendricks* and *Smith*.<sup>17</sup> However, in the years since these decisions, federal and state laws have become increasingly restrictive on the regulated offender. For example, the federal government enacted the Sex Offender Registration and Notification Act (“SORNA”) in 2006, creating a comprehensive sex offender regulation scheme with which all states are required to comply.<sup>18</sup> Since SORNA, states have not only met the minimum federal requirements, but many have enacted laws much more restrictive than required.<sup>19</sup>

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11. *Smith*, 538 U.S. at 90–91; *Hendricks*, 521 U.S. at 350.

12. *Hendricks*, 521 U.S. at 351–53.

13. See generally *Smith*, 538 U.S. 84.

14. *Hendricks*, 521 U.S. at 371; see also *Smith*, 538 U.S. at 105–06.

15. See generally *Hendricks*, 521 U.S. at 373–96 (Breyer, J., dissenting); *Smith*, 538 U.S. at 110–18 (Stevens and Ginsburg, J.J., dissenting) (the relevant regulations included civil confinement and sex offender registration).

16. *Hendricks*, 521 U.S. at 373–96 (Breyer, J., dissenting); *Smith*, 538 U.S. at 110–18 (Stevens and Ginsburg, J.J., dissenting).

17. *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Smith v. Doe*, 538 U.S. 84 (2003) (upholding challenges to sex offender regulations on the ground that the legislatures had a nonpunitive intent).

18. DEP’T OF JUST., SEX OFFENDER REGISTRATION AND NOTIFICATION IN THE UNITED STATES: CURRENT CASE LAW AND ISSUES 1 (2016) [hereinafter SEX OFFENDER REGISTRATION AND NOTIFICATION IN THE UNITED STATES].

19. DiBennardo, *supra* note 3; See also JOAN TABACHNICK & ALISA KLEIN, ASS’N FOR THE TREATMENT OF SEXUAL ABUSERS, A REASONED APPROACH: RESHAPING SEX OFFENDER POLICY TO PREVENT CHILD SEXUAL ABUSE 21 (2011) (among other things, states have legislated

In 2016 the Sixth Circuit Court of Appeals revisited the issue in *Does #1-5 v. Snyder*.<sup>20</sup> In that case, the Sixth Circuit echoed the dissenting opinions in *Hendrix* and *Smith*, and held that Michigan's version of SORNA, the Sex Offender Registration Act ("SORA"), was punitive in nature and thus, "[the] retroactive application of SORA's 2006 and 2011 amendments to Plaintiffs is unconstitutional, and it must therefore cease."<sup>21</sup> To distinguish the current set of regulations from the constitutionally upheld regulatory schemes in *Hendricks* and *Smith*, the *Snyder* court noted that the sex offender statutes of two decades earlier were far more modest than the 2016 SORA law in Michigan.<sup>22</sup> In coming to its conclusion, the Sixth Circuit also relied on empirical studies not available to earlier courts, which contradicted the assumption that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'"<sup>23</sup> The Sixth Circuit's decision was appealed, but the Supreme Court refused to grant certiorari. With a circuit court ruling that current sex offender regulations are punitive rather than nonpunitive, it remains unclear whether future courts will follow suit.

This Note first examines the history of sex offender regulations within the United States, highlighting how the regulations have become more restrictive over the last two decades. Next, this Note discusses the rulings of *Hendricks* and *Smith*, and how these cases have set the legal precedent still followed by a majority of today's courts. Finally, this Note reviews the recent Sixth Circuit's decision in *Does #1-5 v. Snyder*, concluding that the increasing restrictiveness of sex offender regulations, combined with a better understanding of the dangerousness of convicted offenders, may persuade future courts to define post-incarceration sex offender regulations as punitive, and therefore extend to them criminal constitutional protections.

## I. The Increasingly Punitive Nature of Sex Offender Regulations

The detrimental effects on individuals, communities, and governments in implementing our criminal justice system has created a movement towards

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limitations to where an offender can live or work, automatic lifetime sex offender registration, and lifetime GPS monitoring).

20. *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016).

21. *Id.* at 706.

22. *Id.* at 700.

23. *See id.* at 704 (citing LAWRENCE A. GREENFIELD, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* (2003)); *see also* Hal Arkowitz and Scott Lilienfeld, *Once a Sex Offender, Always a Sex Offender? Maybe Not.*, *SCIENTIFIC AMERICAN* (Apr. 1, 2008), <https://www.scientificamerican.com/article/misunderstood-crimes/>. (The authors note that the common assumption that sex offender recidivism rates are extremely high is inaccurate. Additionally, the authors debunk the common assumption that treatment for sex offenders is ineffective.)

reforming sentencing laws, reinstating judicial discretion, and rehabilitating convicted criminals.<sup>24</sup> However, these trends are not being applied to individuals convicted of sex crimes.<sup>25</sup>

During the 1980s and 1990s, legislatures across the nation adopted strict sentencing laws and embarked on a “prison-building, lock-em-up binge,”<sup>26</sup> as a reaction to events such as the 1992 Los Angeles riots and several high-profile murders.<sup>27</sup> This had the effect of quadrupling the national prison population from 500,000 in 1980 to over 2.3 million today.<sup>28</sup> This staggering number translates into the United States housing twenty-five percent of the world’s prisoners, while only having five percent of the world’s population.<sup>29</sup> In the 2000s, California was operating some prisons at 300% design capacity, leading the Supreme Court in *Brown v. Plata* to rule that certain California prisons were violating the constitutional right of inmates to be free from cruel and unusual punishment under the Eighth Amendment.<sup>30</sup> Because of the overcrowding of correctional facilities across the nation, the federal government and states like California have been resisting the “lock ‘em up” mentality of the past and have introduced legislation to reduce penalties for certain categories of crimes.<sup>31</sup> The general consensus is that criminal justice is trending in favor of rehabilitation, granting incentives for inmates to improve themselves, and encouraging them to refrain from gang activity and narcotics use.<sup>32</sup>

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24. George Skelton, *Old Brown Tries to Fix a Young Brown’s Mistake*, L.A. TIMES (Feb. 1, 2016), <http://www.latimes.com/local/politics/la-me-pol-sac-cap-20160201-column.html>.

25. See DiBennardo, *supra* note 3.

26. Skelton, *supra* note 24.

27. *Id.*

28. *Id.*

29. *Criminal Justice Fact Sheet*, NAACP (Jan. 20, 2017), <http://www.naacp.org/criminal-justice-fact-sheet/>.

30. *Brown v. Plata*, 563 U.S. 493, 522, 545 (2011) (“[t]he medical and mental health care provided by California’s prisons falls below the standard of decency that inheres in the Eight Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding.”).

31. See CALIFORNIA SECRETARY OF STATE, OFFICIAL VOTER INFORMATION GUIDE, CALIFORNIA GENERAL ELECTION TUESDAY NOVEMBER 8, 2016 (2016), <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf> (propositions that are designed to reform the criminal justice system and generally reduce criminal sentencing on the November 8, 2016 ballot included: Proposition 57 Criminal Sentencing and Juvenile Crime Proceedings; Proposition 62 Repeal of Death Penalty; Proposition 64 Marijuana Legalization; and Proposition 66 Death Penalty Procedure Time Limits).

32. Ulloa, *supra* note 2; see also NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION OPTIONS FOR CONGRESS (2016) (congress is currently considering legislation (e.g., S. 2123, H.R. 3713) that would put into effect some of the policy options discussed in this report, including expanding the “safety valve” for some low-level offenders, allowing

Sex crime laws have not followed this trend in criminal justice, rather, stricter penalties for sex crimes are constantly being introduced.<sup>33</sup> “[B]etween 2007 and 2008, no fewer than 1,500 sex offender related bills were introduced in state legislatures, and over 275 new laws were passed and enacted.”<sup>34</sup> For example, recently in California, spurred by the media storm surrounding the outcome of the Brock Turner rape trial and the Bill Cosby sexual assault scandal, a host of new sexual assault prevention laws took effect on January 1, 2017.<sup>35</sup> California Senate Bill 813 removed the statute of limitations for the prosecution of sexual assault; Assembly Bill 701 broadened the definition of rape to include forced penetration of any body part with any foreign object; and Assembly Bill 2888 mandated prison time for convicted rapists.<sup>36</sup> The American Civil Liberties Union (“ACLU”) has commented that minority groups and the poor will be most affected by these laws noting that “those who will bear the brunt of this law will be defendants whose parents can’t afford to hire the best attorneys money can buy . . . .”<sup>37</sup> Despite the warnings, enacting anti-sexual assault legislation has been both publicly popular and bipartisan.<sup>38</sup>

While enacting more laws to solve a problem feels good, society must also consider the fact that sex offenders, as a general group, are already among the most heavily punished and regulated group of felons.<sup>39</sup> Continuing to enhance laws in this area risks violating individual rights, increasing prison overcrowding, and imposing an additional burden on members of society who are least able to afford the cost of a legal defense.<sup>40</sup>

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inmates to earn additional good time credit as a part of a risk and needs assessment system, and reducing mandatory minimum penalties for some offenses).

33. TABACHNICK & KLEIN, *supra* note 19, at 21.

34. *Id.*

35. Jazmine Ulloa, *Spurred by Brock Turner Case, Gov. Jerry Brown Signs Laws to Toughen Laws Against Rape*, L.A. TIMES (Sept. 30, 2016), <http://www.latimes.com/politics/la-pol-sac-california-sex-crimes-stanford-cosby-bills-20160930-snap-htmlstory.html>.

36. *Id.*

37. *Id.*

38. *Id.*

39. DiBennardo, *supra* note 3; Press Release, S.F. District Att’y, Man Found Guilty of Sexually Assaulting An Unconscious Woman (Nov. 17, 2016), <http://sfdistrictattorney.org/man-found-guilty-sexually-assaulting-unconscious-woman>; *see also* Deanna, *Suspect Gets 8 Year Sentence for Sexual Assault*, S.F. NEWS (Jan. 13, 2017) [www.thesfnews.com/suspect-gets-8-year-sentence-sexual-assault/33447](http://www.thesfnews.com/suspect-gets-8-year-sentence-sexual-assault/33447) (noting an example of a post-Brock Turner case whereby the defendant was convicted of Oral Copulation of an Unconscious Victim and sentenced to eight years in prison).

40. *Id.*

## A. The Creation of the National Sex Offender Public Registry

Believing that sex offenders pose an extreme danger to society as a whole and that traditional criminal justice practices are inadequate to address the problem, legislatures across the country have enacted civil-regulatory schemes designed to regulate sex offenders long after their period of incarceration.<sup>41</sup> The first national sex offender regulations were enacted to assist law enforcement with sexual assault investigations by legislatures who viewed the recidivism of sex offenders as a serious threat to public safety.<sup>42</sup> Though states had been haphazardly implementing reporting systems for certain classes of offenses for decades, Congress first mandated that states implement a sex offender registry system under the Jacob Wetterling Crimes Against Children and Sexually Violent Predator Act (the Wetterling Act), as part of the Omnibus Crime Bill enacted in 1994.<sup>43</sup>

On October 22, 1989, eleven-year-old Jacob Wetterling, his brother, and a friend were riding their bikes home when a masked gunman stopped the children and kidnapped Jacob.<sup>44</sup> He was never seen again.<sup>45</sup> Due in large part to the activism of the Wetterling family, Congress passed the Jacob Wetterling Act, which required states to create registries of offenders convicted of sexually violent offenses or crimes against children and to establish special requirements for highly dangerous sex offenders known as “sexually violent predators” (“SVP”).<sup>46</sup> The Wetterling Act also required sex offenders to verify their addresses with proper authorities annually for ten years, and required sexually violent predators to verify their address on a quarterly basis for life.<sup>47</sup> The Wetterling Act allowed each state to decide what sex offender registry information should be released and it did not mandate active community notification.<sup>48</sup>

Active community notification was not required until another tragedy spurred lawmakers to action. In 1994, a seven-year-old New Jersey girl

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41. Melissa Hamilton, *Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of Doe v. Snyder* 58 B.C. L. REV. 34, 35 (2017).

42. *Doe #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016) (citing LAWRENCE A. GREENFIELD, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003)); *Smith v. Doe*, 538 U.S. 84, 91 (2003).

43. Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 13701 (2012).

44. Emily Lee, *What is the Wetterling Act? Jacob Wetterling’s Legacy Helped Make the World A Little Safer*, ROMPER (Sep. 4, 2016), <https://www.romper.com/p/what-is-the-wetterling-act-jacob-wetterlings-legacy-helped-make-the-world-a-little-safer-17752>.

45. *Id.*

46. *Megan’s Law & The Adam Walsh Child Protection Act*, PARENTSFORMEGANSLAW.ORG, <https://www.parentsformeganslaw.org/public/meganFederal.html>, (Jan. 14, 2018).

47. *Id.*

48. *Id.*

named Megan Kanka was lured into her neighbor's home, was brutally sexually assaulted, and then murdered.<sup>49</sup> The murderer had been convicted of sexually assaulting two children in the past.<sup>50</sup> The fact that the neighborhood did not know the murderer's past sexual assault history sparked community outrage and the Kanka family, along with other advocates, pushed for what is now known as Megan's Law—a federal amendment to the Jacob Wetterling Act passed in 1996.<sup>51</sup> Megan's Law required all fifty states to establish publicly accessible websites containing sex offender registration.<sup>52</sup> Though states were slow to create online registries, by 2001, twenty-nine states and the District of Columbia had online sex offender registry websites.<sup>53</sup> Megan's Law greatly increased the accessibility of online information to the public, but the law left to the states' own discretion which categories of sex crimes warranted sex offender registration and what types of information to publish to the national online database.<sup>54</sup>

In 1996, as an additional amendment to the Wetterling Act, Congress passed the Pam Lychner Sexual Offender Trafficking and Identification Act, which required state law enforcement to transmit sex offender data and fingerprints to the FBI in order to create a national database of released sex offenders to track their whereabouts and movement.<sup>55</sup> Pam Lychner was an activist and victim of an attempted sexual assault. As the president for Justice for All, an organization founded to advocate for victims of violent crimes, Ms. Lychner pushed for a national database to track sex offenders.<sup>56</sup> Ms. Lychner's law required persons convicted of sexual offenses in states that do not have "minimally sufficient" registration programs to register with the FBI sex offenders' current address, fingerprints, and current

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49. *Megan's Law & The Adam Walsh Child Protection Act*, PARENTSFORMEGANSLAW.ORG, <https://www.parentsformeganslaw.org/public/meganFederal.html>, (Jan. 14, 2018).

50. *Id.*

51. *Id.*

52. *Id.*

53. Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 DRAKE L. REV. 741, 751 (2016) (discussing the history and implications of Megan's Law).

54. *Megan's Law & The Adam Walsh Child Protection Act*, PARENTSFORMEGANSLAW.ORG, <https://www.parentsformeganslaw.org/public/meganFederal.html> (Jan. 14, 2018).

55. *The Pam Lychner Act*, PARENTSFORMEGANSLAW.ORG, [https://www.parentsformeganslaw.org/newscategories/newsArticles/General/GIVING\\_THEIR\\_LIVES\\_FOR\\_LAWS/THE\\_PAM\\_LYCHNER\\_ACT/THE\\_PAM\\_LYCHNER\\_ACT](https://www.parentsformeganslaw.org/newscategories/newsArticles/General/GIVING_THEIR_LIVES_FOR_LAWS/THE_PAM_LYCHNER_ACT/THE_PAM_LYCHNER_ACT) (Jan. 14, 2018).

56. *Megan's Law & The Adam Walsh Child Protection Act*, PARENTSFORMEGANSLAW.ORG, <https://www.parentsformeganslaw.org/public/meganFederal.html> (Jan. 14, 2018).



photograph.<sup>57</sup> The legislation further amended the Jacob Wetterling Act by changing the duration of state sex offender registration requirements from “10 years” to “10 years to life,” depending on the number of prior convictions and the type of crime committed.<sup>58</sup>

In the early 2000s, none of the state sex offender registration websites were integrated or collectively searchable. To address this, Congress passed the PROTECT Act in 2003, which called for the creation of a national registry of convicted sex offenders to be managed by the Department of Justice (“DOJ”).<sup>59</sup> In 2005, the National Sex Offender Public Registry (“NSOPR”) went online and by 2006, all fifty states and the District of Columbia had sex offender registry sites that were collectively searchable by anyone with an internet connection.<sup>60</sup>

## **B. The Second Generation of National Sex Offender Statutes: SORNA**

Spurred to action by the abduction of their son Adam Walsh in 1981, the Walsh family became extremely active in advocating for additional legislation aimed at protecting children from sexual predators.<sup>61</sup> This culminated in the signing of the Adam Walsh Child Protection and Safety Act of 2006 by President George W. Bush and included as its Title I, the Sex Offender Registration and Notification Act (“SORNA”). The Act’s stated purpose was “[t]o protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent offenders.”<sup>62</sup> SORNA replaced the Jacob Wetterling Act and established new minimum federal sex offender regulation standards that states are required to adhere to in order to keep certain federal grant funds.<sup>63</sup>

The changes between the Jacob Wetterling Act and SORNA were significant.<sup>64</sup> In addition to making it a federal crime for a sex offender to

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57. *The Pam Lychner Act*, PARENTSFORMEGANSLAW.ORG, [https://www.parentsformeganslaw.org/newscategories/newsArticles/General/GIVING\\_THEIR\\_LIVES\\_FOR\\_LAWS/THE\\_PAM\\_LYCHNER\\_ACT/THE\\_PAM\\_LYCHNER\\_ACT](https://www.parentsformeganslaw.org/newscategories/newsArticles/General/GIVING_THEIR_LIVES_FOR_LAWS/THE_PAM_LYCHNER_ACT/THE_PAM_LYCHNER_ACT) (Jan. 14, 2018).

58. *Id.*

59. McPherson, *supra* note 53, at 755.

60. *Id.*

61. *Megan’s Law & The Adam Walsh Child Protection Act*, PARENTSFORMEGANSLAW.ORG, <https://www.parentsformeganslaw.org/public/meganFederal.html> (Jan. 14, 2018).

62. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, [hereinafter Adam Walsh Act] (codified at 42 U.S.C. § 16901 *et seq.* (2012)).

63. *Id.*; *see also* Sex Offender Registration and Notification Act, Pub. L. No. 109-248, §125, 120 Stat. 590, 600-01 (2006).

64. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-130211, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: JURISDICTIONS FACE CHALLENGES TO IMPLEMENTING THE ACT, AND

fail to register, SORNA expanded the covered jurisdictions to include all federally recognized tribal entities.<sup>65</sup> SORNA also increased the number of covered offenses to include crimes involving sexual contact as well as sexual acts.<sup>66</sup> SORNA expanded sex offender registration requirements to include juvenile offenders over fourteen years old convicted of certain aggravated sex offenses.<sup>67</sup> In addition, SORNA lengthened the minimum sex offender registration time for Tier I sex offenders to fifteen years, twenty-five years for Tier II sex offenders, and required lifetime registration for rape and sexual contact offenses against children.<sup>68</sup> SORNA also increased the number of in-person appearances with authorities, and required an increase in the number of data points sex offenders must give the authorities to include DNA samples, fingerprints, palm prints, photograph, internet handles (emails and social media names), residency information, employment information and school information.<sup>69</sup> Finally, SORNA mandated that states publish almost all information collected by authorities onto a national sex offender website for public use.<sup>70</sup>

With amendments, SORNA currently provides comprehensive minimum standards for states to adhere to when executing a sex offender regulation program.<sup>71</sup> In 2008, SORNA was amended by the KIDS Act which required jurisdictions to collect internet identifiers, such as email

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STAKEHOLDERS REPORT POSITIVE AND NEGATIVE EFFECTS 8 (2013) [hereinafter SEX OFFENDER REGISTRATION AND NOTIFICATION ACT].

65. Election by Indian Tribes, 42 U.S.C. § 16927 (2006).

66. 18 U.S.C. § 2246(2) (“the term “sexual act” means— (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person”); *cf.* 18 U.S.C. § 2246(3) (“the term “sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”)

67. SEX OFFENDER REGISTRATION AND NOTIFICATION ACT, *supra* note 64, at 8.

68. *Id.* (The federal SORNA statute envisions a tiered sex offender registration system with three levels correlating to the amount of mandatory registration time based on the severity and nature of the offense.).

69. *Id.*

70. *Id.*

71. McPherson, *supra* note 53, at 755.

addresses and social media aliases, from registered sex offenders.<sup>72</sup> In 2011, supplemental guidelines for SORNA were issued requiring that jurisdictions must collect international travel information from sex offenders to monitor the tracking of sex offenders who leave the country.<sup>73</sup> In 2015, Congress passed the Military Sex Offender Reporting Act requiring the Department of Defense to submit registration information about anyone convicted of a sex crime by a military court to the national sex offender registry databases.<sup>74</sup> In 2016, the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders (known as “IML”) was signed into law by President Obama.<sup>75</sup> This codified the requirement that sex offenders must provide twenty-one day advance notice of any international travel or face a criminal violation, and requires the State Department to mark the passport of anyone required to register as a sex offender if the victim was a minor.<sup>76</sup>

### C. State Sex Offender Statutes: Where SORNA is Silent

SORNA was a significant revision of federal sex offender regulation and with amendments, is still in effect. Like other laws establishing a set of federal minimum standards, states are free to enact additional regulatory measures as they deem necessary.<sup>77</sup> To protect their populations, states have taken the liberty to enact their own legislation to regulate sex offenders in areas where SORNA is silent—one area being residency restrictions.<sup>78</sup> Since the passage of SORNA, “over 30 states and hundreds of local counties and municipalities” have adopted restrictions limiting where an offender can live or work.<sup>79</sup> In California for example, Proposition 83 passed in November 2006, known as the Sexual Predator Punishment and Control Act: Jessica’s Law, prohibited certain sex offenders from living within 2000 feet of

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72. KIDS Act of 2008, Pub. L. No. 110-400, 122 Stat. 422 (codified at 42 U.S.C. §§ 16901 *et seq.*).

73. See Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1,630 (Jan. 11, 2011).

74. Military Sex Offender Reporting Act of 2015, Pub. L. No. 114-22, sec. 502(a), §128A Stat. 227, 258 (codified at 42 U.S.C. § 16928a) (May 29, 2015).

75. See International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119 (Feb. 8, 2016).

76. *Id.*

77. SEX OFFENDER REGISTRATION AND NOTIFICATION IN THE UNITED STATES, *supra* note 18.

78. *Id.* at 13 (SORNA’s minimum standards do not address or require residency restrictions in any way.).

79. Bruce Zucker, *Jessica’s Law Residency Restrictions in California: The Current State of the Law*, 44 GOLDEN GATE U. L. REV. 101, 101 (2014).

“schools and parks where children regularly gather.”<sup>80</sup> These prohibitions severely and immediately restricted where sex offenders were able to live and contributed to an epidemic of offender homelessness.<sup>81</sup> In one of the few instances where sex offenders have successfully litigated their legal claims, the California Supreme Court in 2015 ruled that Proposition 83, rather than being a blanket prohibition, should be followed on a case by case basis.<sup>82</sup>

Additionally, a number of states have instituted mandatory lifetime GPS tracking technology for certain classes of sex offenders, and some states have gone so far as to impose internet usage restrictions on sex offenders who are no longer in custody.<sup>83</sup> Though SORNA envisions a three-tiered system for sex offender registration based on the nature of the offense, eighteen states currently register persons convicted of any sex crime for life.<sup>84</sup> Because of the perceived danger that sex offenders pose to society, laws governing the lives of sex offenders and enhancing penalties for sex crimes are constantly being enacted.<sup>85</sup>

## II. Nonpunitive Sex Offender Laws—When the Constitution Does Not Apply

Criminal law affords constitutional protections unavailable to individuals who are regulated pursuant to a civil regulation scheme enacted to protect the public from harm.<sup>86</sup> Thus, the threshold question is whether these laws are punitive or nonpunitive in nature. To determine whether a

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80. 2006 Cal. Legis. Serv. Prop. 83, §21 (West 2014).

81. *In re Taylor*, 60 Cal. 4th 1019, 1023 (2015) (“Blanket enforcement of the residency restrictions against these parolees has severely restricted their ability to find housing in compliance with the statute, greatly increased the incidence of homelessness among them, and hindered their access to medical treatment, drug and alcohol dependency services, psychological counseling and other rehabilitative social services available to all parolees, while further hampering the efforts of parole authorities and law enforcement officials to monitor, supervise, and rehabilitate them in the interests of public safety. It thus has infringed their liberty and privacy interests, however limited, while bearing no rational relationship to advancing the state’s legitimate goal of protecting children from sexual predators, and has violated their basic constitutional right to be free of unreasonable, arbitrary, and oppressive official action.”).

82. *Id.*; see also Kate Mather & Victoria Kim, *California Eases Jessica’s Law Restrictions for Some Sex Offenders*, L.A. TIMES (Mar. 26, 2015), <http://www.latimes.com/local/crime/la-me-jessica-law-20150327-story.html>.

83. Jonathon Hitz, *Removing Disfavored Faces from Facebook: The Freedom of Speech Implications of Banning Sex Offenders from Social Media*, 89 IND. L.J. 1327, 1327 (2014).

84. Margaret Love, *50-State Survey of Relief from Sex Offender Registration*, COLLATERAL CONSEQUENCES RES. CTR. (May 14, 2015), <http://ccresourcecenter.org/2015/05/14/50-state-survey-of-relief-provisions-affecting-sex-offender-registration/>.

85. TABACHNICK & KLEIN, *supra* note 19 (In 2007 and 2008 alone, over 1,500 sex offender-related bills were introduced in state legislatures.).

86. See generally *Kansas v. Hendricks*, 521 U.S. 346 (1997).

regulation is punitive or nonpunitive, the Supreme Court created a two-part intent-effects test in *Kennedy v. Mendoza-Martinez* and *United States v. Ward*.<sup>87</sup> The *Kansas v. Hendrix* and *Smith v. Doe* courts relied on this test to come to the conclusion that sex offender regulations are nonpunitive.<sup>88</sup> Two decades later, in *Does #1-5 v. Snyder*, the same test was applied with opposite results.<sup>89</sup> A growing minority of courts are beginning to rule that these laws are punitive in light of the ever-increasing number and severity of sex offense laws.<sup>90</sup> And as already noted above, “research comparing the recidivism rates of sex offenders with those of non-sex offenders consistently finds that sex offenders have lower overall recidivism rates than non-sex offenders.”<sup>91</sup>

### **A. Punitive or Nonpunitive, the Intent-Effects Test Legal Standard**

To draw a line between punitive and regulatory laws, the Supreme Court adopted the two-part intent-effects test outlined in *United States v. Ward* and *Kennedy v. Mendoza-Martinez*.<sup>92</sup> The Court in *Ward* explains that if it is deemed that the legislature intended the law to be punishment, the analysis ends.<sup>93</sup> If, however, the intent of the law is ambiguous, then a court must consider whether the law is so punitive in purpose or effect as to overcome manifest intent to the contrary.<sup>94</sup> That manifest intent will only be rejected if it can be shown by the “clearest proof that the scheme is so punitive in purpose or effect as to negate” the legislature’s intention to deem it civil.<sup>95</sup>

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87. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963); *United States v. Ward*, 448 U.S. 242, 249 (1980).

88. *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Smith v. Doe*, 538 U.S. at 84 (2003); *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003).

89. *See Does #1-5 v. Snyder*, 834 F.3d 696, 702 (6th Cir. 2016).

90. *See id.* at 696; *Doe v. State*, 189 P.3d 999 (Alaska 2008); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009); *Maine v. Letalien*, 985 A.2d 4 (Me. 2009); *Doe v. Dep’t of Pub. Safety & Corr. Servs.*, 62 A.3d 123 (Md. 2013); *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011); *Starkey v. Okla. Dep’t of Corr.*, 305 P.3d 1004 (Okla. 2013) (detailing all case law from state courts regarding retroactive application of sex offender registration and notification statutes).

91. ROGER PRZYBYLSKI, DEP’T OF JUST., *RECIDIVISM OF ADULT SEXUAL OFFENDERS, SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE* (2015) (noting that though sex offenders are less likely to reoffend in general, they are more likely to commit sex crimes than non-sex offenders).

92. *Mendoza-Martinez*, 372 U.S. at 168–69; *United States v. Ward*, 448 U.S. 242 (1980).

93. *Ward*, 448 U.S. at 248–49.

94. *Id.* at 249.

95. *Id.* at 248–49.

First, a court must determine whether the legislature meant the statute to establish a civil regulation.<sup>96</sup> If the legislature's intention was to enact a civil regulatory scheme that is nonpunitive, courts must then examine whether the statutory scheme is "so punitive in purpose or effect as to negate [the State's] intention to deem it civil."<sup>97</sup> Furthermore, because courts generally defer to the legislature's stated intent, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."<sup>98</sup>

To determine the effect of the regulation, the court then must turn to seven factors outlined in *Kennedy v. Mendoza-Martinez*. These factors include: (1) whether the law imposes an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether its application requires a finding of scienter; (4) whether it promotes the traditional aims of punishment-retribution and deterrence; (5) whether it applies to conduct that is already a crime; (6) whether it can advance legitimate, nonpunitive purposes; and (7) whether it appears excessive in relation to the nonpunitive purpose.<sup>99</sup> After weighing all the factors, the court will determine if the effect is in fact punitive or not independent of the legislatures stated intent.

## **B. The Supreme Court Precedents: *Kansas v. Hendricks* and *Smith v. Doe***

When the Wetterling Act series of federal sex offender regulation statutes were being implemented in the 1990s and 2000s, they were retroactively applied to people who had been convicted of sex crimes before the enactment of these statutes. Because of this retroactive application, the earliest challenges to sex offender regulations were based on the theory that the statutes were violating the ex post facto and double jeopardy clauses of the Constitution.

Section 9, Clause 3 of the U.S. Constitution prohibits ex post facto laws—laws that criminalize "an action and simultaneously provides for punishment of those who took the action before it had legally become a crime."<sup>100</sup> In other words, ex post facto laws are laws that: (1) punish an

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96. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

97. *Smith v. Doe*, 538 U.S. 84, 85 (2003) (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997)); see also *Ward*, 448 U.S. at 248–249.

98. *Smith v. Doe*, 538 U.S. at 92 (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980)) (citing *Hudson v. United States*, 522 U.S. 93, 100 (1997)).

99. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

100. U.S. CONST. art. I, § 9 cl. 3; *Ex Post Facto Law*, BLACK'S LAW DICTIONARY (10th ed. 2014) (Specifically, a law that impermissibly applies retroactively, esp. in a way that negatively

action that, when committed was lawful; (2) makes a crime more severe than when it was committed; (3) changes or increases the punishment retroactively; or (4) alters the rules of evidence from those in effect when the offense was committed.<sup>101</sup> The question whether sex offender registry laws violate the ex post facto clause of the constitution hinged on whether or not the sex offender regulations were enacted for a nonpunitive or civil purpose, or were intended to be punitive.<sup>102</sup>

The Supreme Court first applied the effects-intent test to a challenge of a sex offender statute in *Kansas v. Hendricks*.<sup>103</sup> In 1994, the Kansas Legislature enacted the Sexually Violent Predator Act (“SVPA”) to manage repeat sexual offenders by permitting the state to involuntarily civilly commit them after serving their prison sentence if the offender was deemed a sexually violent predator (“SVP”).<sup>104</sup> Hendricks, after serving nearly ten years of his sentence for taking “indecent liberties” with two thirteen-year-old boys, was slated for release from prison.<sup>105</sup> Shortly before he was released, the state filed a petition seeking to designate Hendricks as a SVP to have him involuntarily committed to civil confinement.<sup>106</sup> Hendricks challenged his civil commitment under the new SVPA on constitutional due process, double jeopardy, and ex post facto grounds.<sup>107</sup> The Kansas Supreme Court determined that the state violated Hendricks’ constitutional due process rights because the SVPA’s definition of “mental abnormality” did not satisfy the “mental illness” requirement in the civil commitment context.<sup>108</sup> The U.S. Supreme Court reversed, finding that the SVPA satisfied constitutional due process because Kansas’s use of “mental abnormality” did satisfy the “mental illness” requirement needed for civil commitment.<sup>109</sup>

The Court then moved on to apply the intent-effects test to determine whether or not the SVPA was punitive—the key question as to whether a double jeopardy or ex post facto violation had occurred.<sup>110</sup> The Court found

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affects a person’s rights, as by making into a crime an action that was legal when it was committed or increasing the punishment for past conduct.).

101. *Calder v. Bull*, 3 U.S. 386, 390–91 (1798).

102. *See generally* *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Smith v. Doe*, 538 U.S. 84 (2003).

103. *Hendricks*, 521 U.S. at 361.

104. *Id.* at 351–53.

105. *Id.* at 353–54.

106. *Id.*

107. *Id.* at 356.

108. *Hendricks*, 521 U.S. at 356.

109. *Id.* at 358.

110. *Id.* at 361.

that the first step of the intent-effects test was satisfied because “nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm.”<sup>111</sup> In looking at the effect, whether the statute was so punitive as to negate the legislature’s intent, the Court examined the SVPA utilizing the *Mendoza-Martinez* factors.<sup>112</sup> Though the Court found that the civil commitment scheme involved an affirmative restraint, that alone was not enough to “lead to the conclusion that the government has imposed punishment.”<sup>113</sup> Thus, the Court held that civil commitment is consistent with the historic nonpunitive practice of confining “mentally unstable individuals,” including persons adjudicated as sexually violent predators.<sup>114</sup> The Court further explained that the SVPA did not implicate retribution or deterrence, two primary objectives of criminal punishment.<sup>115</sup> Because of a lack of punitive effect or intent, the Court concluded that the SVPA was nonpunitive and thus removed “an essential prerequisite” for Hendrick’s double jeopardy and ex post facto claims.<sup>116</sup>

The dissent, in which four justices took part, also used the *Mendoza-Martinez* factors as a guide.<sup>117</sup> It argued that the registration scheme was an ex post facto law and did apply to Hendricks because the SVPA failed the effect portion of the intent-effects test and was therefore punitive.<sup>118</sup> First, they noted that the act resembles punishment because incapacitation is “one important purpose of criminal punishment.”<sup>119</sup> The SVPA imposed confinement through the use of persons, procedural guarantees, and standards traditionally associated with criminal law and did so only on a person who has committed a prior crime.<sup>120</sup> In addition, the act applied only to people who have served their original sentence and does not contemplate evaluation or treatment until after they have served their entire criminal sentence.<sup>121</sup> Further, the statute did not require the committing authority to

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111. *Hendricks*, 521 U.S. at 361.

112. *Id.* at 362–66.

113. *Id.* at 363.

114. *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 748–49 (1987)).

115. *Hendricks*, 521 U.S. at 362.

116. *Id.* at 369.

117. *Id.* at 379 (Breyer, J., dissenting, joined by Stevens, Souter, J.J., in which Ginsburg, J., joined as to Parts II and III).

118. *Id.* at 379.

119. *Id.*

120. *Hendricks*, 521 U.S. at 380, 385.

121. *Id.* at 385.



consider using less restrictive alternatives to confinement.<sup>122</sup> The dissent concluded that because confinement without treatment is facially punitive, and that the passage of the SVPA retroactively applied to the 1984 conviction of Hendricks, the ex post facto clause should apply a constitutional limit in this case.<sup>123</sup>

In *Smith v. Doe*, the Supreme Court struck down another ex post facto challenge for a sex offender registration statute. Relying heavily on the reasoning in *Kansas v. Hendricks*, the Court found that sex offender registration itself, not civil confinement, was nonpunitive and thus did not implicate the ex post facto clause.<sup>124</sup> Passed in 1994, the Alaska Sex Offender Registration Act (“ASORA”) required sex offenders to register with law enforcement and made detailed information about the offender available to the public on the internet.<sup>125</sup> The petitioners challenged the retroactive application of the statute under the ex post facto clause.<sup>126</sup> The U.S. District Court for the District of Alaska granted the offenders summary judgment, and the Ninth Circuit affirmed finding that the statute was punitive despite the legislative intent, thus the ex post facto clause applied.<sup>127</sup>

Unsurprisingly, the U.S. Supreme Court reversed the Ninth Circuit, again looking to the *Mendoza-Martinez* factors to analyze whether the effect of the law was so punitive as to override the legislative intent.<sup>128</sup> The offenders argued that the registration statute resembled the historic punishment of public shaming, but the Court noted that “even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information.”<sup>129</sup> The Court determined that ASORA was simply the dissemination of information and concluded that, “[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.”<sup>130</sup> Next, the Court determined that because ASORA imposes no “affirmative disability or restraint” on the offender, sex offender registration does not resemble imprisonment.<sup>131</sup> Finally, the Court reasoned that the most significant factor is whether the Act is connected to a

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122. *Hendricks*, 521 U.S. at 380, 387.

123. *Id.* at 380, 395.

124. *Smith v. Doe*, 538 U.S. 84, 96 (2003).

125. *Id.* at 91.

126. *Id.*

127. *Id.* at 91–92.

128. *Smith*, 538 U.S. at 92, 97.

129. *Id.* at 99.

130. *Id.* at 98–99.

131. *Id.* at 100.

nonpunitive purpose and found that it was intimately connected with the legislatures desire to protect public safety.<sup>132</sup> Because the Court found the law's intent and effect were nonpunitive, the retroactive application of ASORA was upheld.<sup>133</sup>

Dissenting, Justice Stevens reasoned that ASORA's effect was punitive in nature because it failed the effects portion of the intent-effects test.<sup>134</sup> Justice Stevens looked at the liberty interests implicated in the registration scheme and argued that the "statute impose[s] significant affirmative obligations and a severe stigma on every person to whom they apply," and drew a parallel to reporting duties imposed on criminals during periods of supervised release or parole.<sup>135</sup> In addition to the restriction of a liberty interest, Justice Stevens noted that these sanctions are imposed on everyone who is convicted of a relevant criminal offense and are imposed only on those criminals thus, creating a "sufficient and necessary condition for the sanction."<sup>136</sup> For these reasons, Justice Stevens disagreed with the Court's majority and would have held that ASORA was punitive, and thus constitutional limits to post-incarceration sex offender regulations should apply.<sup>137</sup>

Justice Ginsburg and Justice Breyer also dissented, further adding that the effect of ASORA constituted punishment because of the law's "excessiveness in relation to its nonpunitive purpose."<sup>138</sup> They argued that sex offender registration was similar to the historical punishment of shaming because "it exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism."<sup>139</sup> They also explained that ASORA was excessive because its sanctions were not applied based on a finding of future dangerousness, or to an offenders risk of reoffending, but to whether the conviction was aggravated in some way.<sup>140</sup> Finally, they argued that ASORA constituted punishment because once convicted, no matter that the offender was rehabilitated or rendered harmless by physical incapacitation, there was no way for an offender to be removed from the registry and "he will remain subject to long-term monitoring and inescapable humiliation."<sup>141</sup>

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132. *Smith*, 538 U.S. at 102–03.

133. *Id.* at 105–106.

134. *Id.* at 110–15 (Stevens, J., dissenting).

135. *Id.* at 111 (Stevens, J., dissenting).

136. *Id.* at 112 (Stevens, J., dissenting).

137. *Id.* at 113 (Stevens, J., dissenting).

138. *Smith*, 538 U.S. at 116 (Ginsburg and Breyer, J.J., dissenting).

139. *Id.* at 115 (Ginsburg and Breyer, J.J., dissenting).

140. *Id.* at 116–17 (Ginsburg and Breyer, J.J., dissenting).

141. *Id.* at 117 (Ginsburg, J., Breyer, J., dissenting).

Despite the concerns raised by dissenting Justices, *Kansas v. Hendricks* and *Smith v. Doe* remain law in 2018. Because sex offender regulation statutes remain nonpunitive in nature, states are free to restrict sex offenders in ways that would be constitutionally impermissible if applied to almost any other group of people.

### C. An Opportunity for Change? *Does #1-5 v. Snyder*

After *Kansas v. Hendricks* and *Smith v. Doe*, the issue of whether sex offender regulations were punitive or civil was settled. As of 2018, state courts have generally followed the Supreme Court's lead and held that their respective state's sex offender statutes are nonpunitive.<sup>142</sup> However, seven state supreme courts have found that the retroactive application of sex offender registration laws violated their state constitutions.<sup>143</sup> In one

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142. See McPherson, *supra* note 53, at 778 (noting in n. 211 that the following cases hold sex offender regulations to be civil rather than punitive); see, e.g., Lee v. State, 895 So. 2d 1038, 1041 (Ala. Crim. App. 2004); State v. Henry, 228 P.3d 900, 906 (Ariz. Ct. App. 2010); *In re Alva*, 92 P.3d 311, 313 (Cal. 2004); People v. Tuffo, 209 P.3d 1226, 1230 (Colo. App. 2009); State v. Waterman, 825 A.2d 63, 70-71 (Conn. 2003); *In re W.M.*, 851 A.2d 431, 435 (D.C. 2004); Givens v. State, 851 So. 2d 813, 814 (Fla. Dist. Ct. App. 2003); Frazier v. State, 668 S.E.2d 646, 647 (Ga. 2008); State v. Guidry, 96 P.3d 242, 255 (Haw. 2004); State v. Gragg, 137 P.3d 461, 463 (Idaho 2005); People v. Cornelius, 821 N.E.2d 288, 301 (Ill. 2004); State v. Pickens, 558 N.W. 2d 396, 400 (Iowa 1997); State v. Petersen-Beard, 2016 Kan. LEXIS 241 (Apr. 22, 2016); Buck v. Commonwealth, 308 S.W.3d 661, 666 (Ky. 2010); Smith v. State, 84 So. 3d 487, 498 (La. 2012); Doe v. Sex Offender Registry Bd., 882 N.E.2d 298, 305 n.14 (Mass. 2008); People v. Golba, 729 N.W.2d 916, 924-25 (Mich. Ct. App. 2007); State v. Manning, 532 N.W.2d 244, 248 (Minn. 1995); Garrison v. State, 950 So. 2d 990, 992-93 (Miss. 2006); Doe v. Lee, No. ED 90404, 2009 WL 21097, at \*4 (Mo. Ct. App. Jan. 6, 2009), *sustained and cause ordered transferred* (Mar. 30, 2009), *retransferred*, (Sept. 1, 2009), *opinion on retransfer*, 296 S.W.3d 498 (2009); State v. Mount, 78 P.3d 829, 835 (Mont. 2003); State v. Harris, 817 N.W.2d 258, 273 (Neb. 2012); State v. Eighth Judicial Dist. Court, 306 P.3d 369, 385 (Nev. 2013); State v. Costello, 643 A.2d 531, 533 (N.H. 1994); Doe v. Poritz, 662 A.2d 367, 388 (N.J. 1995); State v. Drukenis, 86 P.3d 1050, 1059 (N.M. Ct. App. 2004); Doe v. Div. of Prob. & Corr. Alts., 654 N.Y.S.2d 268, 270 (Sup. Ct. 1997); State v. Sakobie, 598 S.E.2d 615, 618 (N.C. Ct. App. 2004); State v. Burr, 598 N.W.2d 147, 152 (N.D. 1999); State v. MacNab, 51 P.3d 1249, 1256 (Or. 2012) (en banc); Commonwealth v. Lee, 935 A.2d 865, 877 (Pa. 2007); State v. Germane, 971 A.2d 555, 593 (R.I. 2009); State v. Walls, 558 S.E.2d 524, 526 (S.C. 2002); Meinders v. Weber, 604 N.W.2d 248, 255-56 (S.D. 2000); State v. Gibson, No. E2003-02102-CCA-R3-CD, 2004 WL 2827000, at \*5 (Tenn. Crim. App. Dec. 9, 2004); Rodriguez v. State, 93 S.W.3d 60, 69-70 (Tex. Ct. Crim. App. 2002); State v. Briggs, 199 P.3d 935, 943-44 (Utah 2008); State v. Thompson, 807 A.2d 454, 459 n.3 (Vt. 2002); Kitz v. Commonwealth, 475 S.E.2d 830, 832 (Va. Ct. App. 1996); State v. Ward, 869 P.2d 1062, 1068 (Wash. 1994) (en banc); Hensler v. Cross, 558 S.E.2d 330, 335 (W. Va. 2001); State v. Sturdevant, No. 2006AP3185, 2008 Wisc. App. LEXIS 1055, at \*1 (Wis. Ct. App. Apr. 17, 2008); Kammerer v. State, 322 P.3d 827, 832 (Wyo. 2014).

143. In reverse chronological order, the states are Oklahoma, Maryland, Ohio, Indiana, Maine, Alaska, and Missouri. See Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1035-36 (Okla. 2013) (detailing all case law from state courts regarding retroactive application of sex offender registration and notification statutes); Doe v. Dep't of Pub. Safety & Corr. Servs., 62 A.3d 123, 149 (Md. 2013); State v. Williams, 952 N.E.2d 1108, 1113 (Ohio 2011); Wallace v. State, 905

confusing day in 2016, two contradicting opinions came out of the Supreme Court of Kansas. *Doe v. Thompson* held that the Kansas sex registration statute was punishment, and thus, violated the ex post facto clause, while *State v. Petersen-Beard* overruled the first case, holding the opposite.<sup>144</sup> Subsequently, the Kansas Supreme Court has declined to revisit the ex post facto question on at least five occasions.<sup>145</sup>

Despite the lack of enthusiasm most courts seem to have about protecting the constitutional rights of sex offenders, the Sixth Circuit reignited the debate by deciding *Does #1-5 v. Snyder*.<sup>146</sup> In this case, the plaintiffs (sex offenders) challenged Michigan's Sex Offender Registry Act ("SORA"), arguing that the amendments to SORA, specifically after 2006, violated their constitutional rights.<sup>147</sup> Despite long-standing precedent, the Sixth Circuit determined that SORA was a punitive statute and thus, criminal constitutional protections apply to sex offenders.<sup>148</sup> In making its decision, the Sixth Circuit took note of two important factual changes since the Supreme Court decided *Hendricks* and *Smith*: First, they noted that SORA was far more restrictive than earlier registration schemes; and second, they pointed out that scientific studies suggest that sex offenders might not be as dangerous to the public previously thought.<sup>149</sup> The court then analyzed the ex post facto implications of SORA through the intent-effects test and generally followed the *Mendoza-Martinez* factors by asking five questions:<sup>150</sup> (1) does the law inflict what has been regarded in our history and traditions as punishment?;<sup>151</sup> (2) does it impose an affirmative disability

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N.E.2d 371, 384 (Ind. 2009); *State v. Letalien*, 985 A.2d 4, 31 (Me. 2009); *Doe v. State*, 189 P.3d 999, 1019 (Alaska 2008) (same plaintiff as in *Smith v. Doe*, 538 U.S. 84 (2003)); Missouri's case, *Doe v. Phillips*, 194 S.W.3d 833 (Mo. 2006) (en banc) (has subsequently been rendered moot); *Doe v. Lee*, 2009 WL 21097, at \*4.

144. *Doe v. Thompson*, 373 P.3d 750 (2016) (holding that KORA was punitive and thus violated the ex post facto clause) *overruled by* *State v. Petersen-Beard*, 377 P.3d 1127 (2016) (holding that KORA was civil in nature).

145. *See Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (certiorari denied in 2017); *United States v. Kebodeaux*, 570 U.S. 387 (2013) (assuming without deciding that Congress did not violate the ex post facto clause in enacting SORNA's registration requirements); *United States v. Juvenile Male*, 564 U.S. 932 (2011) (declining to address whether SORNA's requirements violated the ex post facto clause on grounds of mootness); *Carr v. United States*, 560 U.S. 438 (2010) (declining to address the issue of whether SORNA violates the ex post facto clause).

146. *See generally Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016).

147. *Id.*

148. *Id.*

149. *Does #1-5 v. Snyder*, 834 F.3d at 704 (citing LAWRENCE A. GREENFIELD, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* (2003)).

150. *Id.* at 701.

151. *Id.*

or restraint?;<sup>152</sup> (3) does it promote the traditional aims of punishment?;<sup>153</sup> (4) does it have a rational connection to a non-punitive purpose?;<sup>154</sup> and (5) is it excessive with respect to this purpose?<sup>155</sup>

In answering the first question, the Sixth Circuit found that “while SORA is not identical to any traditional punishments, it meets the general definition of punishment, has much in common with banishment and public shaming, and has a number of similarities to parole/probation.”<sup>156</sup> With regards to “affirmative disability or restraint” the court recognized that SORA’s provisions are more onerous than those in *Smith v. Doe* and pointed out that even though “no one is actually being lugged off in cold irons[,]” SORA puts direct restraints on personal conduct.<sup>157</sup> In answering the third question, the court noted that new studies have shown that SORA does not appear to prevent recidivism, and that “SORA advances all the traditional aims of punishment.”<sup>158</sup> In analyzing whether SORA had a rational relationship to a nonpunitive purpose, the court cited a study suggesting that the Act does not actually reduce recidivism, the law’s stated purpose for being.<sup>159</sup> It noted that SORA might actually increase offender recidivism because it makes it “hard for registrants to get and keep a job, find housing, and reintegrate into their communities.”<sup>160</sup> This is of particular importance because the court here used empirical scientific evidence to rebut the presumption decision-makers have held for decades: that “sex offenders pose an extreme risk to the public, one that criminal sanctions fail to sufficiently thwart.”<sup>161</sup> In answering the fifth question, the court argued that the restraints the statute imposes are not outweighed by positive effects, and that the “punitive effects of these blanket restrictions thus far exceed even a generous

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152. Does #1-5 v. Snyder, 834 F.3d at 704 (citing LAWRENCE A. GREENFIELD, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* (2003)).

153. *Id.*

154. *Id.* at 696, 701.

155. *Id.*

156. *Id.*

157. *Id.* at 703

158. *Id.* at 704.

159. Does #1-5 v. Snyder, 834 F.3d at 704. *See also* PRZYBYLSKI, *supra* note 91. (Recap of recent scientific research into the dangerousness of sex offenders concludes that the recidivism of sex offenders is difficult to measure but, there is indication that sex offenders, although more likely to commit sex crimes than other criminals, generally reoffend less than other convicted persons.).

160. Does #1-5 v. Snyder, 834 F.3d 696, 705 (6th Cir. 2016).

161. Melissa Hamilton, *Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of Doe v. Snyder*, 58 B.C. L. REV. E-Supplement 34 (2017).

assessment of their salutary effects.”<sup>162</sup> The *Snyder* court concluded the *ex post facto* question by opining that:

A regulatory regime that severely restricts where people can live, work, and “loiter,” that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska’s first generation registry law. SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information. We conclude that Michigan’s SORA imposes punishment. And while many (certainly not all) sex offenses involve abominable, almost unspeakable, conduct that deserves severe legal penalties, punishment may never be retroactively imposed or increased.<sup>163</sup>

In reversing the district court’s ruling on *ex post facto* grounds, the Sixth Circuit declined to address the plaintiffs’ other constitutional bases for challenging SORA, which included vagueness, free speech under the First Amendment, and restrictions on work and travel under the Fourteenth Amendment.<sup>164</sup> However, the Sixth Circuit recognized that these challenges are “far from frivolous and involve matters of great public importance.”<sup>165</sup>

In this case, the Sixth Circuit recognized that sex offender regulations as of 2016 are vastly more restrictive than they were in 1997 and 2003 when *Hendricks* and *Smith* were decided, and that sex offenders might not be as dangerous as previously thought. The Supreme Court declined to grant *certiorari* to *Does #1-5 v. Snyder*; however, it is unclear whether the changing factual situation regarding the restrictiveness of sex offender regulations and offenders actual rate of recidivism will sway future courts.

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162. *Does #1-5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016).

163. *Id.* at 705–06.

164. *Id.* at 706.

165. *Id.*

## Conclusion

Sexual crimes often involve unspeakable acts and should be severely punished. However, as a society based on the rule of law, we need to ensure that everyone is granted meaningful constitutional protections. Under the current system, when a state imposes a registry requirement on a sex offender, and the terms of that requirement are later increased by a subsequent law, the ex post facto imposition of additional restrictions does not violate the constitution. The offender must accept the new regulation even if it means, as in some states, that the offender will never have any hope of getting off the registry in his or her lifetime. Ignoring the constitutional protections afforded to criminals by labeling post-incarceration sex offender regulations as civil, rather than punitive, circumvents the rights of the convicted.

As discussed, governments rationalize sex offender regulations by asserting that these laws are necessary to protect the public, and “[c]ourts have mostly rubberstamped this assertion without paying much heed to whether the presumption of future dangerousness is factually accurate.”<sup>166</sup> In *Hendricks* and *Smith*, both courts relied on the intent-effects test as well as deferred to the legislature’s perception that sex offenders are extremely dangerous to uphold their rulings. Since these cases were decided, however, additional research has questioned the decades-old assumption that sex offenders are more dangerous and recidivistic than other convicts.<sup>167</sup>

To protect the constitutional rights of sex offenders, I would first encourage legislatures to enact appropriate *punitive* post-incarceration regulation schemes for those who commit sex crimes to enable individuals regulated by these laws access to criminal constitutional protections. For example, the sex offender registration requirements could be part of the convict’s probation. This would give those convicted of sex crimes certainty about the requirements of their sentence because future laws would not apply retroactively.

Second, to further reduce the dangerousness of these criminals, counseling and therapy resources should to be made available to sex offenders while incarcerated.<sup>168</sup> Though there is some debate about whether sex offenders are truly mentally ill, therapeutic treatments have been shown

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166. Hamilton, *supra* note 161, at 36 (arguing that Judges who ignore recent scientific evidence that tends to show that sex offenders are not a “singular and exceptional” group that poses a higher than average danger to society are “complicit in perpetuating unnecessary, unfair, and arbitrary laws that negatively impede upon the lives of individuals to whom they apply”).

167. *Does #1-5 v. Snyder*, 834 F.3d at 705; *see also* Przybylski, *supra* note 88.

168. PRZYBYLSKI, *supra* note 91. (concluding that “the evidence suggests that that treatment for sex offenders—particularly cognitive-behavioral/relapse prevention approaches—can produce reductions in both sexual and nonsexual recidivism”).

to meaningfully decrease the chance convicted sex offenders commit future sex crimes.<sup>169</sup>

Lastly, because rehabilitation is one of the aims of our criminal justice system, society should reserve imposing automatic lifetime sex offender registration requirements for the most heinous classes of sex crimes, allowing the majority of offenders to eventually reintegrate into society without the stigma of being on a public, searchable, online database.

Nothing in this Note should be construed as defending the actions of those who commit sex crimes. Sex offences are extremely serious in nature, and the perpetrators of such acts must be punished accordingly. However, whatever punishment society deems just must be enacted as such, and not enacted as a civil regulatory measure to contravene our Constitution. As Alexander Hamilton noted in *The Federalist No. 44*, “as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice . . . [because] such lawmaking has ‘been, in all ages, [a] favorite and most formidable instrument[] of tyranny.’”<sup>170</sup> The protections the constitution preserves, even for criminals, cannot be compromised or circumvented. Though convicted sex offenders have committed terrible offenses, if our society continues to regulate offenders’ post-incarceration lives to the degree we currently do, future courts and lawmakers must recognize these regulations are punitive, and thus afford individuals commensurate constitutional rights.

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169. PRZYBYLSKI, *supra* note 91.

170. *Does #1-5 v. Snyder*, 834 F.3d 696, 706 (6th Cir. 2016) (*quoting* CLINTON ROSSITER, *THE FEDERALIST PAPERS* NO. 84 512 (1961)).